Supreme Court of the United States

OCTOBER TERM, 1965

No.

JOSEPH E. SEAGRAM & SONS, INC., *et al.*,

Appellants,

v.

DONALD S. HOSTETTER, Chairman, JOHN C. HART, WALTER C. SCHMIDT, BENJAMIN H. BALCOM, ROBERT E. DOYLE, constituting the State Liquor Authority, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of the Court of Appeals of the State of New York sustaining the validity of part of Section 7 and the entirety of Section 9 of Ch. 531, 1964 New York Session Laws, as these sections apply to appellants in this case.

Citations of Opinions Below

The opinion of the Court of Appeals of the State of New York and the opinion of the three dissenting judges are included at pages 349-357 of the certified transcript of

record[1] and are set forth in Appendix A hereto. The opinion of the New York Supreme Court, Appellate Division, Third Department, is included at Tr. 167-170, and is set forth in Appendix B hereto. The opinion of the New York Supreme Court, Special Term, Albany County, is reported in 45 Misc. 2d 956, 258 N. Y. S. 2d 442 (1965). It is included at Tr. 6-19, and is set forth in Appendix C hereto.

Jurisdiction

This action was commenced by a complaint of certain manufacturers and wholesalers of distilled spirits for declaratory and injunctive relief (Tr. 140-164) praying that appellees be permanently enjoined from enforcing part of Section 7 and the entirety of Section 9 of Chapter 531, 1964 New York Session Laws.[2] The complaint also asked that these sections be declared violative of the Constitution of the United States. The complaint claimed that these sections violate Article 1, Section 8 of the Constitution of the United States in that they lay a prohibitive burden upon interstate commerce conducted by appellants (Tr. 153). As these challenged sections also conflict with federal antitrust statutes, it was charged that, they violate Section 6 of the Constitution of the United States, commonly referred to as the supremacy clause (Tr. 152). Section 9 of Ch. 531 would force appellants to charge prices in New York which are no higher than the lowest prices at which appellants or "related persons" who are not appellants in this action charge elsewhere in the United States. The complaint also asserted that Section 9 of Chapter 531, 1964 New York

[1] Hereinafter references to the record in the court below are cited "Tr. ......"

[2] Section 9 of Chapter 531, 1964 New York Session Laws, is also hereinafter cited as "Section 9 of Ch. 531" and "Section 9."

Session Laws, violates Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that forcing appellants to charge a price in New York no higher than that charged elsewhere in the nation (Tr. 149) denies them their property without due process of law.

The effect of Section 9 on liquor wholesalers is limited to certain "related person" New York wholesalers, whereas it allows competing wholesalers to price according to free market conditions. Section 9 does not affect the price of "private brand" liquors. The complaint also asserted that Section 9 denies appellants the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States (Tr. 153).

A Special Term of the New York Supreme Court denied the requested relief and granted appellees' cross motion for a declaration that the challenged sections of Chapter 531, 1964 New York Session Laws, are in all respects constitutional. The New York Supreme Court, Appellate Division, Third Department, affirmed the decision at Special Term. The Court of Appeals of the State of New York, over the dissent of three judges, affirmed the decision at Special Term.

The final order of remittitur of the Court of Appeals of the State of New York was dated and entered on July 9, 1965, and is set forth in Appendix D hereto. The notice of appeal was filed with the New York Supreme Court, Albany County, on July 23, 1965 (Tr. 360).

Appellants made an application to Chief Judge Charles Desmond for a stay of the challenged sections of Chapter 531 pending the determination of an appeal to this Court. A stay was granted until August 16, 1965, in order to allow appellants to apply for a stay before Mr. Justice Harlan,

the Circuit Justice for the Second Circuit. On August 5, 1965, Mr. Justice Harlan stayed enforcement of the challenged sections of Chapter 531 pending the determination of an appeal to this Court, on the condition that appellants file their Jurisdictional Statement by September 10, 1965.

Jurisdiction to hear the appeal is conferred on this Court by 28 U. S. C. § 1257 (2). The following cases sustain the jurisdiction of this Court:

Carter v. *Virginia,* 321 U. S. 131 (1944);

Goldblatt v. *Town of Hempstead,* 369 U. S. 590 (1962);

Poulos v. *New Hampshire,* 345 U. S. 395 (1953);

Southern Pacific Co. v. *Arizona,* 325 U. S. 761 (1945).

Statutes Involved

For some time manufacturers and wholesalers of distilled spirits have been required to file a schedule of prices at which they will sell in New York during the immediately succeeding month with the State Liquor Authority. This practice, useful to the State in enforcing its previous policy of mandatory retail price maintenance in the distilled spirits industry—a state-enforced as opposed to the usual vendor-enforced "fair trade" act—is not challenged here.

However, Section 9 of Chapter 531, 1964 New York Session Laws, provides that all distillers and certain wholesalers selling in New York will file a duly verified affirmation with each price schedule attesting that the schedule lists prices that are no higher than the lowest charged by these distillers or by independent wholesalers elsewhere in the United States during the immediately preceding

month. Failure to file the affirmation will prevent both distillers and wholesalers from selling the brand in question for at least a month. Filing a false affirmation, even innocently, can result in license revocation, penal sentences and severe fines.

In order to understand the rationale of this maximum pricing legislation, it is necessary to examine Section 8 of Chapter 531, which states the legislative purpose underlying Section 9. The text of Chapter 531, 1964 New York Session Laws, with the challenged sections appropriately indicated, is set forth in Appendix E. A discussion of the effect of Section 9 is found *infra,* pp. 11-15.

Section 7 of Chapter 531, 1964 New York Session Laws, has added new conditions to the basic price filing requirements. Section 7 of Chapter 531 now prohibits a New York wholesaler from purchasing distilled spirits from a manufacturer unless that manufacturer has filed a schedule with the State Liquor Authority listing the prices at which the manufacturer sold to wholesalers "irrespective of the place of sale or delivery" of such liquor. Furthermore, the price schedules relating to distiller to wholesaler and wholesaler to retailer sales must now include "the net bottle and case price paid by the seller."

Questions Presented

1. Does the Twenty-first Amendment to the Constitution of the United States permit the New York State Legislature to enact laws which levy their primary economic burden on the operations of the alcoholic beverage industry in other states and which were not enacted to regulate any social problems arising from the use of these beverages?

2. Does Section 9 of Ch. 531, in conflict with the terms and policies of the Sherman and Robinson-Patman Acts, violate Article 6 of the Constitution of the United States?

3. Does Section 9 of Ch. 531, by requiring appellants to price in New York in accordance with a standard based upon their lowest prices elsewhere in the nation, violate Article 1, Section 8 of the Constitution of the United States?

4. Does Section 9 of Ch. 531, having no relation to a legitimate police power aim, violate the due process clause of the Fourteenth Amendment to the Constitution of the United States?

5. Does Section 9 of Ch. 531, which limits the maximum price New York "related person" wholesalers may charge for alcoholic beverages to the lowest price a wholesaler in any other state charged during the immediately preceding month while permitting other New York wholesalers to charge any price they choose, violate the equal protection clause of the Fourteenth Amendment to the Constitution of the United States?

6. Do certain parts of Section 7 of Ch. 531 also violate these constitutional guarantees?

Statement

Appellants shall describe the parties to this action and shall attempt to present a concise summary of relevant sections of the New York State Alcoholic Beverage Control Law (hereinafter cited as the "ABC Law") prior to passage of the challenged sections. Only by an examination of the philosophy underlying the entire ABC Law and the reasons for the passage of Section 9 of Chapter 531, 1964

New York Session Laws, can a true understanding of the impact of Section 9 be attained.

A. The Parties.

Appellants are distillers (manufacturers), wholesalers and importers of branded distilled spirits.

Appellant-distillers include the great majority of the producers of distilled liquor who sell to wholesalers and, in some cases, retailers in New York. These distillers sell their products, where permitted, throughout the United States and in many foreign countries. In addition certain distillers are United States importers and distributors for distilled spirits produced in foreign countries. Distillers who are qualified to do business in New York generally possess either a distiller's or a wholesaler's license as described in Sections 61 and 62 of the ABC Law. Those not qualified to do business in New York sell to duly licensed wholesalers, some of whom act as agents for distillers in filing distiller-to-wholesaler price schedules as required by Section 101-b-3(a) of the ABC Law. Those distillers possessing licenses generally file their own price schedules.

Appellant-wholesalers conduct a substantial part of the annual dollar volume of wholesale distilled spirits sales in New York. While the majority of these wholesalers are independent New York concerns, some others are nationwide parent companies which own outlets in New York and elsewhere that conduct wholesale liquor operations. Every appellant-wholesaler possesses a New York wholesaler's license.

Appellant-importers purchase distilled spirits from foreign manufacturers and sell to wholesalers and retailers under authority of New York wholesaler's licenses.

Appellees are Donald S. Hostetter *et al.,* Chairman, and members of the State Liquor Authority, the body charged with administering the ABC Law and empowered to revoke distillers' and wholesalers' licenses for violations thereof and the Attorney General of the State of New York, Louis J. Lefkowitz, whose office is authorized to prosecute criminal proceedings for violations of Section 101-b, as amended, of the ABC Law.

B. The Law Concerning Liquor Prices Prior to Ch. 531.

Section 101-b of the ABC Law was enacted in 1942 to promote temperance and to prevent undue stimulation of sales of alcoholic beverages arising from the granting of discounts, rebates, allowances, and free goods to "selected licensees" by certain manufacturers and wholesalers.

Generally, Section 101-b prohibits distillers and wholesalers from discriminating between like situated customers (1) in price, (2) in discounts for time of payment or (3) in quantity of merchandise. Thus, a distiller must offer the same base price and the same discounts to all those New York wholesalers to whom he sells. Similarly, New York wholesalers must offer the same base price and the same percentage discounts to all their retail customers.

Except for a maximum 2 per cent quantity discount and a 1 per cent discount for payment on or before 10 days from date of shipment, distillers and wholesalers of distilled spirits are prohibited from granting directly or indirectly "any discount, rebate, free goods, allowance or other inducement." ABC Law, Section 101-b-2(b).

To implement these restrictions, Section 101-b-3(a) requires a schedule to be filed monthly by the owner of a brand of liquor, or a wholesaler designated as agent by the

owner. The schedule is required to list the bottle and case price to wholesalers plus such information as the brand or trade name, capacity of package, nature of contents, and the age and proof where stated on the label.

A similar schedule of prices and general information is required to be filed by any manufacturer or wholesaler selling the brand in question to retailers.

Likewise, Section 101-c of the ABC Law was enacted in 1950 to promote temperance by eliminating price wars "which unduly stimulate the sale and consumption of liquor and wine. . . ." This section prohibited sales of liquor and wine at retail until the owner of a brand of liquor or wine, his designated wholesale agent, or any wholesaler approved by the State Liquor Authority filed a schedule with the Authority listing the minimum price at which the particular brand could be sold to the consumer. The mandatory resale price maintenance section was enforced by the State Liquor Authority, unlike the ordinary State "fair trade" law which is enforced by private action.

To these restrictions on the right to set one's prices in response to free market conditions, at the distiller and wholesaler levels, were grafted the provisions of Sections 7 and 9, Chapter 531, 1964 New York Session Laws, in April 1964.

C. Events Preceding 1964 Legislation to Amend the Alcoholic Beverage Control Law.

In his annual message to the Legislature on January 9, 1963, Governor Nelson A. Rockefeller announced the appointment of a Moreland Act Commission to undertake a study of the State Liquor Authority's administrative structure, practices and procedures. This Commission, com-

posed of distinguished citizens, made several studies and held a number of hearings in its efforts to become acquainted with the conduct of the alcoholic beverage industry in New York.

After taking voluminous testimony, the Moreland Act Commission concluded that Section 101-c was directly responsible for higher retail liquor prices in New York than in other states and tended to thwart that price competition which exists in a normal, vigorously competitive market. The recommendation of the Commission was to the point:

> Section 101-c of the ABC Law, which provides for SLA enforcement of minimum consumer resale prices fixed by the distillers, should be repealed.
>
> (Moreland Commission to Study the Alcoholic Beverage Control Law, Study Paper No. 3 (Tr. 275).)

The studies of the Commission call for a free competitive market in distilled spirits. At no time did the Commission advocate the maximum price controls embodied in the amendments to Section 101-b which are the subject of this action. The Commission called for the repeal of state enforced retail price maintenance because it felt this artificial price support was responsible for a higher retail liquor price in New York. It believed that after repeal of mandatory retail price maintenance the competition inherent in a free market could be counted upon to give a fair market price to New Yorkers. The Commission did not believe, contrary to the philosophy underlying old Section 101-c of the ABC Law, that artificially high retail liquor prices serve to promote temperance, the sole rationale for legislative regulation of liquor in New York.

D. The New Act.

In accordance with the recommendations of the Moreland Act Commission, Section 101-c of the ABC Law, the mandatory retail price maintenance section, was repealed by Section 11 of Ch. 531.

The rationale for the repeal of Section 101-c is contained in Section 8 of Ch. 531, which states that "fundamental principles of price competition should prevail in the manufacture, sale and distribution of liquor" in New York. Section 8 further states that New York consumers of alchoholic beverages should not be discriminated against by paying "unjustifiably higher" prices for brands of liquor than are "paid by consumers in other states." Section 8 maintains that "price discrimination and favoritism are contrary to the best interest and welfare of the people of this state." It continues by stating the belief that enactment of Section 11, repealing mandatory resale price maintenance, "will provide a basis for eliminating such discrimination against and disadvantage of consumers in this state." Section 8 then goes on to assert the legislative conclusion that it is necessary to enact the maximum price provisions of Section 9 of Ch. 531, "in order to forestall possible monopolistic and anti-competitive practices designed to frustrate the elimination of such discrimination and disadvantage."

Contrary to the belief of appellees and the majority opinion of the court below, the repeal of mandatory resale price maintenance is not challenged in this action.

Section 9 of Ch. 531 adds eight paragraphs to Section 101-b-3 of the ABC Law. These are paragraphs (d)-(k).

Paragraphs (d)-(g) of Section 9 place maximum price restrictions upon the sale of non-private label liquors in New York. Under paragraph (d) every basic schedule of prices to be charged wholesalers during the immediately succeeding month, required by Section 101-b-3(a), must now in effect list prices that are "no higher than the lowest price" given by the brand owner, a wholesaler designated as his agent or by a "related person" to any wholesaler elsewhere in the United States during the immediately preceding month. This is so because an affirmation verified by the party filing the basic schedule and stating that the prices in the schedule are no higher than the lowest charged elsewhere must accompany each such schedule. See ABC Law, Section 101-b-3(d) and (e). As noted, the price filed will be the price at which the item must be sold during the immediately succeeding month. Thus, for example, the lowest April price charged outside New York will be filed in the New York price schedule in May and will be the actual New York price in June.

The term "related person" is defined as any person in whose business the brand owner has a direct or indirect interest. It also means any person whose "exclusive, principal or substantial business" is the sale of a brand or brands of liquor "purchased from such brand owner or wholesaler designated as agent." A related person also includes one who has "an exclusive franchise or contract to sell such brand or brands." ABC Law, Section 101-b-3(d) and (f).

Pursuant to paragraph (f) a brand owner or wholesaler designated as agent by the brand owner must affirm that the prices listed in the basic schedule of prices to New York retailers filed by New York wholesalers are no

higher than the lowest price at which such item of liquor was sold by the brand owner, the wholesaler designated as his agent, or *any* "related person" doing business anywhere else in the nation to any retailer, exclusive of state retail agencies, elsewhere in the United States during the immediately preceding month.

Similarly, a wholesaler who is somehow determined to be a person "related" to a brand owner may not sell to New York retailers unless the brand owner or his agent affirms that the wholesaler's New York price schedule contains prices no higher than the lowest charged retailers elsewhere in the United States by the brand owner, his agents, or any person selling to retailers anywhere else in the nation who is "related" to the brand owner or his agents.

The definition of a "related person" in paragraph (f) is virtually the same as that in paragraph (d).

If a New York wholesaler is willing to attest that he is not a "related person", he may file a price schedule and affirmation containing a price of his own choosing, if his sales are confined to New York State only. However, should a non-related person wholesaler sell in any other state, he must affirm that his New York price is no higher than the price at which he sold in the other state. This freedom of price is granted by paragraph (g) and by amended Rule 16 of the State Liquor Authority.

Should an appropriate affirmation of a price no higher than the lowest granted elsewhere not be filed as required, paragraph (h) prohibits the sale of such item during the period covered by the price schedule in question.

Before a brand owner affirms that the price contained in a particular schedule is no higher than the lowest granted

elsewhere, he is required by paragraph (i) to make "appropriate reductions" for all "discounts in excess of those to be in effect under such schedule [the maximum 2 per cent quantity and 1 per cent time discount], and all rebates, free goods, allowances and other inducements of any kind whatsoever offered or given to any such wholesaler, state (or state agency) or retailer" purchasing the item elsewhere in the United States. Excluded from such "appropriate reductions" are differentials which reflect differences in state taxes and fees and "the actual cost of delivery." Paragraph (i) defines state taxes and fees as "excise taxes imposed or the fees required by any state or the District of Columbia upon or based upon a gallon of liquor, and the term 'gallon' shall mean one hundred twenty-eight fluid ounces."

A person making a false statement in any affirmation filed pursuant to paragraphs (d)-(g) will be deemed guilty of a misdemeanor pursuant to paragraph (j) of Section 9. Upon conviction, the maximum penalty will be a fine of $10,000 or imprisonment for a term of not more than 6 months or both. Pursuant to Section 7, paragraph 6 of Ch. 531, a company whose prices are improperly affirmed can lose its New York license and forfeit its bond.

By paragraph (k) a person convicted in accordance with paragraph (j) may not be able to affirm a price schedule for up to three months, at the discretion of the State Liquor Authority.

To summarize the significant changes in the amendments to Section 101-b-3 which are the subject of this action: (1) those selling to wholesalers and certain wholesalers selling to retailers cannot sell to their customers until the brand owner affirms that the price quoted for an item of

liquor (an item includes each separate bottle size of each brand) in the basic price schedule is no higher than the lowest price at which the item was sold elsewhere in the United States during the immediately preceding month by the brand owner or a person "related" to the brand owner; (2) these prices must reflect all allowances, discounts and other inducements given elsewhere to any wholesaler or retailer in the United States; (3) if the brand owner fails to file the affirmation, neither he nor the independent "related person" wholesalers of that brand may sell it in New York for the period of the price schedule—one month; (4) the new amendments are penal in nature, and one making any false statement in the affirmation is subject to prosecution for a misdemeanor and possible revocation of his license to sell in New York.

Section 101-c of the preexisting ABC Law is repealed and there is no longer any mandatory resale price maintenance covering liquor in New York. As with the basic price schedules of Section 101-b-2 and 3, the no higher than the lowest price provisions do not apply to brands of liquor that are owned exclusively by a single retailer.

E. Appellants' Operational and Pricing Structure.

Generally, distilled spirits are marketed under trade or brand names owned by the distiller, his designee or a foreign manufacturer, although some are marketed by wholesalers and retailers using their own "private labels."

The bulk of appellant-distillers' merchandise is marketed in the several states through independent wholesalers not having an exclusive franchise (Tr. 71). These wholesalers are under no legal compulsion to inform a distiller of the price at which they sell to retailers (Tr. 118, 122, 123).

Certain appellant-wholesalers conduct a nationwide wholesale business selling the brands of appellant-distillers and their own brands. However, the majority of appellant-wholesalers are independent New York merchants who conduct their operations only within the State of New York.

Due to varying regulations in each state affecting excise tax levels and conditions of sale, market limits in the distilled spirits industry are conterminous with state geographical boundaries (Tr. 111). Mississippi is the only completely dry state in the Union. Thus, there are at least fifty distinct market areas when the District of Columbia is included. However, within each market there exists a high degree of competition between different brands within the same generic type of liquor and, more broadly, between the generic types themselves (Tr. 111). An individual distiller may sell as many as 150 brands of various types of liquor within one market. These brands are sold in several different bottle sizes. Each brand may face a different competitive situation in each market. Seasonal variations in drinking habits and consumer demand affect, as in many other commodities, the net price which the product can command at any given time. Similarly, regional competition in the form of private labels and popular local brands have the result of temporarily affecting the price of a nationally known brand (Tr. 95).

New York sales account for some 12% of the national consumption of distilled spirits (Tr. 107).

Private label liquor sales account for 12% of the total sales of New York retailers carrying such brands. Yet the prices at which retailers purchase these labels are not required to be posted nor does the ABC Law impose maximum

price limitations upon these brands at any merchandising level.

In any determination of price, whether at the distiller or wholesaler levels, the element of cost is a primary consideration. Currently, Metropolitan New York wholesalers operate on one of the lowest levels of profit in the country. On the average they realize less than one per cent net profit on their net sales before taxes (Tr. 113). This is largely because their net operating expenses average 10.88% of net sales (Tr. 113). In 1963 upstate New York wholesalers averaged a net profit of .66% on their net sales before taxes. Their operating expenses averaged 11.5% of net sales (Tr. 113). These expense figures are among the highest in the nation. The national figures for firms of comparable sales volume are: operating expenses 9.87% of net sales and before-tax profits 1.42% (Tr. 113). This profit figure is roughly double that of reporting New York firms. As an example of contrast, Florida wholesalers in 1963 had operating expenses of only 7.34% of net sales and profits of 1.52%. Other large metropolitan centers such as St. Louis and Chicago had figures better than the national average (Tr. 113). The maximum price provisions in the 1964 amendments to Section 101-b do not make allowance for these differences in the cost of doing business.

Nor have distillers realized an excessively high rate of profit at the expense of New York consumers. The actual facts reflect a different situation. Of the 65 industries analyzed in 1963 by the First National City Bank, the distilling industry ranked 53rd in percent of return on investment, behind such others as automobiles, soft drinks, drugs and medicines (Tr. 110).

F. Opinions Below.

Four judges of the Court of Appeals of the State of New York voted to affirm the judgment of the Supreme Court, Special Term, which was affirmed by the Supreme Court, Appellate Division, Third Department, holding that the Twenty-first Amendment to the Constitution of the United States shielded the challenged sections of Chapter 531 from an attack based upon violations of other sections of the federal constitution. To the majority of the Court of Appeals, the ability of the State to prohibit entirely the traffic in liquor *ipso facto* allows the legislature, once it decides to permit the sale of distilled spirits, to regulate the industry in any manner it sees fit, without regard to federal constitutional guarantees.

The majority found that even though the effect of Section 9 of Ch. 531 is to force appellants to tie their prices in New York to those prevailing in other states, there is no resulting interference with interstate commerce (Tr. 352). The majority went on to say that if the effect of Section 9 of Chapter 531 "on New York is too low a price they have it within their power to raise the lowest price elsewhere" (Tr. 352). The majority cited opinions of this Court rendered shortly after ratification of the Twenty-first Amendment to the Constitution of the United States, for the proposition that the commerce clause, Article 1, Section 8 of the Constitution of the United States, is no longer applicable to the distilled spirits industry.

Nor did the majority of the Court of Appeals feel that Section 9 of Chapter 531, 1964 New York Session Laws, violates the supremacy clause of the federal constitution, Article VI, because of conflict with the federal Sherman and Robinson-Patman Acts.

Three judges of the Court of Appeals stated that while a state is indeed empowered to prohibit the sale of distilled spirits entirely, if it chooses to allow the industry to operate it must do so in a constitutional manner. The dissenting judges chose to set forth at length the reasons why Section 9 of Chapter 531 is not a valid function of the State's police power. However, in his opinion Chief Judge Desmond emphasized that he was not overlooking "a number of other troublesome aspects of these amendments", even though the dissenting opinion failed to discuss them at length (Tr. 357).

The decision of the majority of the Court of Appeals betrays these fundamental faults:

1. It assumes that the Twenty-first Amendment to the federal constitution has rendered the commerce clause a dead-letter in the area of alcoholic beverages and permits the states to control the alcoholic beverage industry in a way which has a real and marked effect on the conduct of the industry in other states.

2. While not willing to state that the Twenty-first Amendment to the federal constitution can sustain a state act in conflict with a federal act and thus violate Article VI of the Constitution, the majority opinion failed to recognize the sharp conflict of Section 9 of Chapter 531 with federal antitrust acts.

3. In reasoning from the premise that the power to prohibit intoxicating liquor includes the power to regulate arbitrarily if sale is permitted, the majority of the Court of Appeals fell into a logical fallacy which prevented it from realizing that the state has a legal obligation, once it

permits alcoholic beverages to be sold within the state, to regulate traffic in this commodity in accordance with constitutional standards.

The Questions Presented are Substantial

POINT I

The Twenty-first Amendment to the Constitution of the United States does not validate a New York statute which levies its major economic burden on the operations of the distilled spirits industry in other states and which does not promote temperance or check evils peculiar to the trade in alcoholic beverages in New York.

Section 2 of the Twenty-first Amendment to the Constitution of the United States proclaims:

> The transportation or importation into any State, Territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited. Ratified December 5, 1933.

A major case dealing with the Twenty-first Amendment realized that the Amendment "has not given the states plenary and exclusive power to regulate the conduct of persons doing an interstate liquor business outside their boundaries." *United States* v. *Frankfort Distilleries,* 324 U. S. 293, 299 (1945).

The opinion below of the Court of Appeals concluded that, regardless of whether Section 9 of Ch. 531 violates the commerce clause, it is protected by the Twenty-first Amendment to the federal constitution because Section 9 does not affect appellants' operations outside New York.

An examination of some of the undeniable effects of Section 9 on appellants' operations in other states and on the administration of alcoholic beverage control laws in these states will illustrate the error of the court below.

The uncontroverted facts in this case show that the cost of doing business in New York for distillers and wholesalers is among the highest in the country. See p. 17, *supra.* The sale of alcoholic beverages in New York accounts for approximately 12% of the nation's total. See p. 16, *supra.*

If all prices in New York State were limited to the lowest price charged in any single sale in the low-cost states—as mandated by the statute—many New York wholesalers would be forced out of business unless distillers could somehow force "related person" wholesalers in other states to charge their customers artificially high prices. Similarly, distillers will have to ignore lower selling expenses in other states and sell at artificially high prices in other states or else sell at a loss in New York.

Thus one of the actual major economic effects of the New York statute may well be the imposition of artificially higher prices in other states at rates which will enable each of the distillers and wholesalers to continue to do business in New York State. This fact was recognized by the entirety of the Court of Appeals (Tr. 352, 357). This probable effect on business and commerce in other states is not merely incidental to a valid regulation of prices for sales within New York State—it is a major economic effect of the legislation.

Similarly, a producer, nationwide wholesaler or importer of branded distilled spirits selling in the largest market in the nation will not be free to determine his price

in response to competitive situations in other markets without determining the effect that such price will have on his New York market. Contracts of sale in other states will be negotiated with concern as to their effect on the New York price structure. One will certainly be loath to grant temporarily a promotional discount on 100 cases of his product in, say, Arizona to meet a local competitive condition if he will be required to grant the same discount on the sale of 10,000 cases in New York.

Likewise, distillers wishing to sell to New York "related person" wholesalers must affirm that the price at which these wholesalers sell to New York retailers is no higher than the lowest price at which "related person" wholesalers in other states sold to retailers elsewhere in the United States during the immediately preceding month. To make this affirmation distillers will have to secure price information from related person wholesalers in other states and insist upon the filing of the lowest of these prices by New York wholesalers who come within the "related person" definition. Section 9 forces the distiller to run the risk of a Sherman Act prosecution by collecting and disseminating this information and acting as a conduit for what amounts to a price agreement between certain New York wholesalers and the wholesaler who sells the particular brand at the lowest price elsewhere in the United States during a particular month. *Cf. American Column & Lumber Co.* v. *United States,* 257 U. S. 377 (1921). It can also be said that the distiller, by refusing to affirm the price schedule of a New York wholesaler who lists prices higher than the lowest collected by the distillers from wholesalers around the country, is engaging in conduct prohibited by the Sherman Act. See pp. 38-39, *infra.*

Of course this collection of the price information required by Section 9 which may lead to a Sherman Act prosecution will be conducted outside of New York and thus transcend the limits of the Twenty-first Amendment set forth in *Frankfort Distilleries, supra.* Assuming arguendo that the state is permitted by the Twenty-first Amendment to burden interstate commerce virtually as it pleases *within the boundaries of the state, Frankfort* makes it clear that the Twenty-first Amendment will not allow a state to pass liquor legislation which has the real effect of requiring a distiller to violate the basic federal antitrust laws *in another state* if he is to comply with the state act. When a state does so "it demands private conduct which the Sherman Act forbids." *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384, 389 (1951).

So, too, Section 9 will impose upon other state liquor legislation. For example California allows wholesalers to grant a maximum 8% discount for quantity purchases but, like many other states, places no restrictions on discounts offered by distillers. See Chapter 1, Title 4, California Administrative Code, Rule 100(1). New York only allows a 2% liquor quantity discount, but by the terms of Section 101-b-3(i), any discount in excess of 2% accorded elsewhere must be given to New York purchasers. Will distillers be willing to grant California purchasers discounts in excess of 2% if this will affect their New York prices? Will not Section 101-b-3(i) have the practical effect of negating the California Act? A seller in California must now weigh any decision to grant a discount in excess of 2% by the effect this will have on his profits in New York as well as California.

Thus, from what has been said above, it is evident that the primary economic impact of Section 9 will be directed towards industry operations without the borders of New York. Only when pricing policies and reporting procedures are established in other states will Section 9 have any effect on operations in New York. New York will not experience the economic impact of this section on prices until some two months after the prices are charged in other states. The federal constitution does not allow one state to interfere with commerce in and among the other states in this manner.

It is true that early decisions of this Court cited by the majority below appeared to state that the commerce clause in particular and perhaps other sections of the federal constitution in general are virtual dead letters when alcoholic beverage regulation is at issue. These cases generally allowed discriminatory charges and other burdens to be imposed upon imported alcoholic beverages and also allowed one state to place these burdens on the alcoholic beverages imported from a second state while allowing these beverages to be imported without discriminatory treatment when introduced from a third state. See, *e.g.*, *Joseph S. Finch & Co.* v. *McKittrick*, 305 U. S. 395 (1939); *Indianapolis Brewing Co.* v. *Liquor Control Comm'n*, 305 U. S. 391 (1939); *Mahoney* v. *Joseph Triner Corp.*, 304 U. S. 401 (1938); *State Board of Equalization* v. *Young's Market Co.*, 299 U. S. 59 (1936).

However, none of the statutes at issue in these cases required a prior act in another state by industry members as a condition of compliance with the challenged legislation. None of the statutes were claimed to have had the slightest

price or marketing impact in other states. And not one of these states seized upon its economic power to force businesses operating in interstate commerce to price at a level having no regard for the economics of the market in the legislating state. The statutes in these cases were concerned mainly with protecting a local industry through the imposition of obstacles on out of state producers. Whether this was a goal that should have been protected by the Twenty-first Amendment is obviously not the question here. But it is clear that the cases acceding to this protection of home-grown industry cannot stand as authority when a state demands unjustifiably lower prices, even though the result, admittedly, may be higher prices in other states.

This Court has failed to endorse its earlier general statements regarding the breadth of the Twenty-first Amendment. In 1945 the Court emphasized that federal control over the interstate aspects of the alcoholic beverage industry has not been entirely delegated to the states by the Twenty-first Amendment as the early cases imply. *United States* v. *Frankfort Distilleries,* 324 U. S. 293 (1945).

Commentary following the *Frankfort* decision approved this restrictive view of the scope of the Twenty-first Amendment, a note in the Yale Law Journal stating:

> The language of Section Two does not purport to grant to the states a plenary power unrestricted by pre-existing constitutional limitations. True, it prohibits the transportation and importation of liquors into a state in violation of "the laws thereof," but it would not require boldness beyond the capacity of the Supreme Court to interpolate the word "proper" to modify "laws." This interpolation is supported by the canon that a construction which raises a conflict

> between parts of a constitution is inadmissible when, by reasonable interpretation, the parts may be made to harmonize. In other cases the Courts have freely implied similar limitations to seemingly all-embracing language in order to effectuate the purpose of an amendment. Note, *The Twenty-First Amendment Versus the Interstate Commerce Clause,* 55 Yale L. J. 815, 816 (1946).

In the past term this Court has struck down state legislation which attempted to overreach state borders in regulating alcoholic beverages. In *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.,* 377 U. S. 324 (1964), the State of New York attempted to exert jurisdiction over a corporation engaged in the business of selling liquors to departing airline travelers. In attempting to justify its act, the State Liquor Authority asserted that the commerce clause does not apply to the state regulation of liquor. In support of this claim, the Authority relied upon the line of cases cited at p. 24, *supra.*

This Court remained faithful to its decision in *Frankfort* and rejected this view. The opinion of Mr. Justice Stewart countered the assertion that the commerce clause had been repealed by the Twenty-first Amendment by calling this view "an absurd oversimplification." 377 U. S. at 332. Mr. Justice Stewart stated:

> Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case." 377 U. S. at 332.

The majority opinion of the Court of Appeals of the State of New York found that not only does the Twenty-

first Amendment eliminate any commerce clause considerations, but that it also cannot be used to protect state legislation in direct conflict with federal statutes (Tr. 354). While the majority's interpretation of the relationship between the Twenty-first Amendment and the commerce clause violates the balancing test of *Idlewild,* its view that the Twenty-first Amendment can serve to allow state liquor legislation in direct conflict with federal statutes is even more in conflict with decisions of this Court.

Shortly after rendering the *Frankfort* decision, this Court made the following observation in *Nippert* v. *City of Richmond,* 327 U. S. 416, 425 n. 15 (1946):

> "Thus, even the commerce in intoxicating liquor, over which the Twenty-first Amendment gives the States the highest degree of control, is not altogether beyond the reach of the federal commerce power, *at any rate when the State's regulation squarely conflicts with regulation imposed by Congress governing interstate trade or traffic . . .*" (Emphasis added.)

Of course the Sherman and Robinson-Patman Acts are examples of this type of congressional legislation. See pp. 31-39, *infra.*

In a companion case to *Idlewild, Department of Revenue* v. *James B. Beam Distilling Co.,* 377 U. S. 341 (1964), this Court held that where a state enactment affecting intoxicating liquors is contrary to an explicit command of the Constitution—in that case Article I, Section 10, the export-import clause—the Twenty-first Amendment will not save the state statute. Mr. Justice Stewart, again writing for the majority, averred:

> . . . What is involved in the present case, however, is not the generalized authority given to Congress by

> the Commerce Clause, but a constitutional provision which flatly prohibits any State from imposing a tax upon imports from abroad . . .
>
> This Court has never so much as intimated that the Twenty-first Amendment has operated to permit what the Export-Import Clause precisely and explicitly forbids . . . 377 U. S. at 344-46.

Beam also serves as a warning that the Twenty-first Amendment will not protect the attempt of Section 9 to require foreign producers to make their prices in other states of the country a basis for their New York prices. Because the terms under which import trade may be conducted necessarily involves foreign relations, any such restrictions can only be imposed by Congress or the federal executive.

If the decisions in *Idlewild, Beam, Nippert* and *Frankfort* are compromised, not only will state antitrust legislation in conflict with federal enactments be encouraged but the way will be clear for states to pass with impunity any legislation directed towards the alcoholic beverage industry in conflict with *any* federal act, notwithstanding how remote the state legislation may be from the protection of the public from the alleged social evils of liquor. The most demagogic type of state legislation could ensue. See generally Comment, 25 Calif. L. Rev. 718, 728 (1936).

Such a possible chamber of horrors has not escaped judicial concern, for the Sixth Circuit rejected a claim of state absolutism in the realm of liquor legislation based upon the Twenty-first Amendment when it observed:

> Followed to its logical conclusion, the appellant's construction, if valid, would mean that the federal

> government no longer has power to punish theft of intoxicants from interstate shipments of alcoholic beverages under the authority of the so-called Car Seal Act, ***nor to regulate or prohibit unfair trade practices in respect to such commodities through the Federal Trade Commission,*** nor to regulate tariffs through orders of the Interstate Commerce Commission, nor to prohibit unfair labor practices affecting commerce in intoxicants by brewers or distillers under the authority of the National Labor Relations Act, 29 U. S. C. A. § 151 et seq., nor to prescribe minimum wages or maximum hours for employees in such enterprises under the authority of the Fair Labor Standards Act, 29 U. S. C. A. § 201 et seq. These implications demonstrate the tenuousness of the appellant's broad contentions. *Jatros* v. *Bowles,* 143 F. 2d 453, 455 (6th Cir. 1944). (Emphasis added.)

The foregoing discussion readily demonstrates the substantiality of the federal question involved concerning the scope of the Twenty-first Amendment. Unlike its posture in early cases concerning this Amendment, the Court is now aware that there are real limits upon state power to legislate freely in the realm of alcoholic beverages. As succeeding sections of this Statement will illustrate, this maximum price legislation raises real and substantial federal questions involving violations of the supremacy and commerce clauses of the federal constitution. It is submitted that this Court should assume jurisdiction of this case in order to ascertain whether these real constitutional violations can be neutralized by the Twenty-first Amendment.

POINT II

The provisions of Section 9 requiring distillers and wholesalers to offer New York purchasers a price no higher than the lowest price charged elsewhere violate the policy and terms of federal antitrust acts and are thus in conflict with the supremacy clause of the Constitution of the United States.

Section 8 of New York Session Laws, 1964, Ch. 531, states that Section 101-c of the ABC Law, providing for mandatory resale price maintenance of branded distilled spirits, is being repealed because it has resulted in price discrimination and disadvantage to New York consumers. This discrimination, the Legislature declares, has taken the form of unjustifiably higher prices being charged to New Yorkers, in comparison with prices charged consumers in other states. However, Section 8 continues by implying that manufacturers and wholesalers of branded distilled spirits might attempt to frustrate the elimination of price discrimination and disadvantage declared to be the result of mandatory resale price maintenance by engaging in "monopolistic and anti-competitive practices" once Section 101-c of the ABC Law is repealed. It thus becomes a matter of "legislative determination" that the no higher than the lowest price provisions contained in Section 9 are needed to prevent manufacturers, distributors and importers of branded distilled spirits from frustrating the policy of encouraging "fundamental principles of price competition" inherent in the revocation of mandatory resale price maintenance.

Stripped of its ambiguous verbiage Section 8 states that state-enforced resale price maintenance has produced unjustifiably higher consumer prices which may continue in

spite of the repeal of Section 101-c, and it is only through special anti-price discrimination and anti-monopoly legislation, directed only at certain segments of the branded distilled spirits industry, that the possible continuance of this presumed inequitable situation may be avoided. The Legislature impliedly believes that unregulated pricing policies at the distiller and wholesaler levels will not produce free and untrammeled competition. It should be noted that, while the Legislature struck down state-enforced resale price maintenance, it did not prevent the industry from fixing consumer prices by resorting to the Feld-Crawford Act, N. Y. Gen. Bus. Law, § 369-a. The Feld-Crawford Act is the general New York fair trade statute.

Keeping in mind that the legislative purpose is to "forestall possible monopolistic and anti-competitive practices" which would, if not controlled, lead unjustifiably to higher prices for New York consumers, a comparison of this state antitrust legislation with federal acts on the same subject will demonstrate the serious federal constitutional question involved.

By juxtaposing the Robinson-Patman Act, 15 U. S. C., §§ 13(a)-(f), 21(a) (1959), it becomes apparent that the New York act, designed to thwart potential price discrimination, is in direct conflict on several counts with this federal statute having the same purpose.

In enacting the maximum price provisions of Section 9 of Ch. 531, the New York Legislature has failed to make allowance for different market and competitive situations in different areas of the country or for variations in the cost of doing business in different states, aside from actual delivery and state excise gallonage tax expenses. Exemplary of

this is the fact that all allowances, rebates, or other inducements given in other markets which contribute to the lowest net price at which a brand of liquor is sold elsewhere in the United States are required to be accorded to New York buyers, regardless of whether giving these promotional allowances to buyers in other states in fact affects the competitive position of New York sellers or purchasers. This is in clear contrast with Section 2(a) of the Robinson-Patman Act, which makes it illegal for a seller to discriminate in price between different purchasers of commodities of like grade and quality only "where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce . . ."

The New York rule, however, is absolute. It makes no difference if price differentials in various states in no way tend to lessen competition or create a monopoly between buyers or sellers in New York or destroys or prevents competition in any other state. The Robinson-Patman Act does not condemn mere geographical price differentials absent a showing of lessened competition between the sellers or buyers as a result of the differential. See *F. T. C.* v. *Anheuser-Busch, Inc.*, 363 U. S. 536 (1960); *Sachs* v. *Brown-Forman Distillers Corp.*, 134 F. Supp. 9 (S.D.N.Y. 1955); *In the Matter of General Foods Corp.* (I), 50 F.T.C. 885 (1954). Thus, what is permitted by the Robinson-Patman Act is prohibited by Section 9 of Ch. 531.

Moreover, Section 2(a) of the Robinson-Patman Act does not render illegal price differentials which merely reflect differences in the cost of sale resulting from differing quantities "in which such commodities are to such purchasers sold or delivered."

Section 101-b-2(b) of the ABC Law, it will be remembered, places a maximum quantity discount of 2% on sales of liquor to New York customers. If a larger quantity discount is offered to customers in other states and such discount results in the lowest price offered in the United States, that part of the discount which exceeds 2% must be granted to New York customers, regardless of the actual amount of goods ordered by the New York customer and without regard to whether such discount can be "cost justified" under the Robinson-Patman Act. See ABC Law, Section 101-b-3(i). Thus, under the terms of the Robinson-Patman Act a quantity discount may be offered only when "cost justified", but if such a legitimate differential were a factor in the lowest price charged elsewhere in the United States, one cannot sell branded distilled spirits in New York unless the same discount is granted New York customers where it may be unjustified and hence discriminatory against one's competitors selling in New York State. *Cf. F. T. C.* v. *Anheuser-Busch, Inc.*, 363 U. S. 536 (1960). What is required under Section 9 of Ch. 531 is prohibited by the Robinson-Patman Act.

Section 2(b) of the Robinson-Patman Act allows the seller to differentiate in price between his customers if the seller can demonstrate that the price differential is "made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

This Court has specifically ruled that the purpose of this provision is to abet what is inherent in our competitive system, *i.e.*, to allow a seller to defend himself by meeting his competitor's price. See *Standard Oil Co.* v. *F. T. C.*, 340 U. S. 231, 248-49 (1951).

The New York law grants no such exemption for price differentials between customers in New York and other states. Should a manufacturer or wholesaler of branded distilled spirits reduce his price in another state to meet competition from another manufacturer or wholesaler, who may or may not sell in New York, with the result that the net price becomes the lowest quoted anywhere in the United States for the particular brand, that brand of liquor cannot be sold in New York unless the same price is quoted to the appropriate New York purchasers. The seller of a brand will be compelled to grant an unearned discount in New York or be in violation of Section 9, even though the Robinson-Patman Act realizes the value to competition inherent in such price differentials. Section 9 of Ch. 531 would perforce have the effect of eliminating price as an aspect of meeting competition in these markets.

Moreover, while manufacturers at least have the choice of whether to engage in such price competition, New York wholesalers do not. If a wholesaler in another state lowers his price to retailers to meet local competition and that price becomes the lowest at which such brand is being sold at wholesale elsewhere in the United States, New York wholesalers who are somehow determined to be "related persons", without regard to differentials in the cost of doing business, profit margins or competitive pressures, must give that same price to New York retailers or else breach Section 9 of Ch. 531.

Sections 2(d) and (e) of the Robinson-Patman Act, taken together, prevent a seller from either paying a buyer for promotional services furnished the seller by the buyer or from granting or furnishing such services to the buyer unless the seller accords other *competing buyers* the same

services on proportionately equal terms. If the purchasers are not in competition with one another, then the seller may grant disproportionate services and/or allowances. See Austin, *Price Discrimination,* 117 (1950).

However, the no higher than the lowest price amendments of Section 9 require a manufacturer or wholesaler of branded distilled spirits, who grants allowances, rebates or other "inducements of any kind whatsoever" to buyers in other states, to provide the same discounts to New York customers if these discounts have the effect of making the total net price the lowest quoted anywhere in the United States. Requiring a seller to give his New York customers the same promotional discounts given customers not in competition with New York purchasers is yet another example of how the new amendments to Section 101-b compel distillers and wholesalers of branded distilled spirits to price their goods in a manner not mandated by the Robinson-Patman Act.

In pertinent part Article VI of the Constitution of the United States, commonly called the supremacy clause, provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding.

Thus, the conflict is clear, for in terms used by the Court of Appeals of the State of New York in *Quaker Oats Co.* v. *City of New York,* 295 N. Y. 527 (1946), New York has attempted to forbid "what the Government has authorized" or to permit what the Congress has prohibited. 295 N. Y. at 536.

A state act is invalid if it conflicts with either the language or the policy of a federal act even assuming the act to be otherwise in furtherance of the State's police power, which is not the case here. *Franklin Nat'l Bank* v. *New York*, 347 U. S. 373 (1954); *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761 (1945). As has been seen, the no higher than the lowest price provisions of Section 9 of Ch. 531 specifically requires private action prohibited by the Robinson-Patman Act and objects to private action permitted by the Robinson-Patman Act.

But the provisions of Section 9 go further; they also contravene the policy embodied in the Sherman Act, 15 U. S. C., §§ 1-7 (1959).

Section 1 of the Sherman Act provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is hereby declared to be illegal. . . .
>
> Section 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a misdemeanor. . . .

Mr. Justice Black summarized the rationale underlying the Sherman Act when he said

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, *the lowest prices*, the highest quality and the greatest material progress, *while at the same time providing an environment conducive to the preservation of our democratic, political*

and social institutions. Northern Pacific Railway Co. v. *United States,* 356 U. S. 1, 4 (1958). (Emphasis added.)

The New York Legislature subverts this federal doctrine of competition based upon free market demands as well as its own stated desire for the return of "fundamental principles of price competition" in the liquor industry, for it commands producers, wholesalers and importers of distilled spirits to grant New York purchasers a price as low as that granted elsewhere regardless of differing competitive factors which may enter into the determination of that lowest price in another state. The Sherman Act does not make price differentials illegal, nor does it necessarily regard parallel prices among competitors as a violation of economic liberty. See *Theatre Enterprises, Inc.* v. *Paramount Film Distrib. Corp.,* 346 U. S. 537, 541 (1954); *United States* v. *International Harvester Co.,* 274 U. S. 693, 708-09 (1927); *United States* v. *United States Steel Corp.,* 251 U. S. 417, 447-50 (1920).

Again, as with the Robinson-Patman Act, the New York provisions regarding maximum liquor pricing are in conflict with the basic elements of federal antitrust policy. The Sherman Act, "a charter of economic liberty" which assumes that government should not interfere with the free market until certain deleterious acts are definitely perceived, is subverted by the amendments to Section 101-b of the ABC Law, which establish a charter of economic restraint rather than economic freedom. A seller of branded distilled spirits in other markets, facing differing competitive situations including varying costs of doing business, must judge his pricing policy in light of the effect it will have upon his New York price. The Sherman Act is a doctrine embracing the traditional American free enterprise

concept of unrestrained and vigorous competition, while the New York act is an attempt to coerce purveyors of branded distilled spirits into granting New York retailers a price which may have no relation to the actual competitive situation in New York. That such a policy is antithetical to the rationale of the Sherman Act can hardly be questioned.

As noted earlier, see p. 22, *supra,* the real effect of Section 9 will be to force distiller-brand owners to act as a clearing house of price information between "related person" wholesalers in New York and elsewhere in the country, thus exposing these distillers to Sherman Act prosecution.

Under these same circumstances, it is clear that the New York wholesaler, having no knowledge of wholesale prices elsewhere in the United States, will be required by the brand owner-distiller to file a price in his monthly schedule which the brand owner can affirm is the lowest given elsewhere. This can be accomplished with even a minimum degree of certainty only if the wholesaler submits his proposed price schedule to the distiller in advance of filing with the State Liquor Authority. The distiller, with what knowledge he has been able to glean concerning the lowest wholesale prices elsewhere in the United States, must insist that the New York wholesaler amend his proposed price if the distiller has knowledge that a wholesaler elsewhere in the country made even one sale of the brand in question at a lower price during the immediately preceding month. The New York wholesaler will thus be able to know at what price he will sell to retailers during the next month only after receiving the approval of the brand owner, who must in effect inform the wholesaler at what price to sell, using as a guide the lowest wholesale price anywhere else in the nation.

There can be little doubt that such activity, not directly ordered and specifically protected by the terms of Section 9, can avoid giving rise to a Sherman Act violation. *Compare United States* v. *Parke, Davis & Co.,* 362 U. S. 29 (1960), *with United States* v. *Colgate & Co.,* 250 U. S. 300 (1919). See *F. T. C.* v. *Beech-Nut Packing Co.,* 257 U. S. 441 (1922); *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.,* 340 U. S. 211 (1951).

The cases discussed above illustrate an inescapable conclusion: a state statute, no matter if enacted in furtherance of a valid police power objective as is not the case here, is invalid if its terms are in conflict with the language or policy of a federal enactment. The conclusion is inescapable because the command of the supremacy clause is absolute. Federal laws are the supreme law of the land, and no contrary state enactment can challenge federal supremacy. Unlike other areas of constitutional law, the supremacy clause brooks no balancing test, no weighing of conflicting policies. Should this Court find the sections of Ch. 531 under examination in this action in conflict with federal law, it is constitutionally bound by Article VI to assert its jurisdiction and repudiate the offending state provisions.

POINT III

Section 9 of Chapter 531, 1964 New York Session Laws, places an undue and illegal burden on interstate commerce.

The commerce clause of the Constitution of the United States, Article I, Section 8, Clause 3 reads as follows: "The Congress shall have power . . . To regulate Commerce with foreign Nations and among the several States . . ."

The majority of the New York State Court of Appeals flatly stated that Section 9 of Ch. 531 does not interfere with interstate commerce (Tr. 352). " 'Commerce is interstate' . . . when it 'concerns more States than one'." *United States* v. *South-Eastern Underwriters,* 322 U. S. 533, 551 (1944) (quoting Marshall, C. J., in *Gibbons* v. *Ogden,* 22 U. S. (9 Wheat.) 1 (1824)). If Section 9 were in force, no appellant would make any contract of sale in any other state without carefully weighing the effect on his New York price schedules in the immediately ensuing month. Every transaction in every other state will be subject to interference by this act of the New York Legislature. This fact was implicitly underscored by the entirety of the court below, which recognized that higher prices in other states may well be the result of the enforcement of Section 9 (Tr. 352, 357).

If they do not accede to the commandment of Section 9 of Ch. 531, appellants can be prohibited from doing business in New York, which accounts for 12% of the total national sales of distilled spirits. Also, any appellants filing a false affirmation face criminal penalties and loss of their licenses—even if the affirmation is innocently in error. See ABC Law, Section 101-b-3(j). In effect the New York Legislature has ordered appellants to price their goods at a level sufficient to ensure that New York retailers and consumers will receive a price as low as is granted anywhere else in the United States regardless of competitive or cost variations. It is submitted that this legislation is an attempt to exact economic advantage in favor of New York purchasers in exchange for the right to sell goods in the largest market in the nation. As such it is patently illegal under the commerce clause. *Baldwin* v. *G. A. F.*

Seelig, Inc., 294 U. S. 511 (1935); *Hood & Sons, Inc.* v. *DuMond,* 336 U. S. 525, 535 (1949) ("*Baldwin* v. *Seelig,* . . . is an explicit . . . and unanimous condemnation by this Court of economic restraints on interstate commerce for local economic advantage, but it does not stand alone."); see Dowling, *Interstate Commerce and State Power—Revised Version,* 47 Colum. L. Rev. 547, 550 (1947).

The line of decision beginning with *Seelig* was reaffirmed recently by *Polar Ice Cream and Creamery Corp.* v. *Andrews,* 375 U. S. 361 (1964).

Seelig and its successors have, of course, been severely violated by the no higher than the lowest price provisions of Section 9 of Ch. 531, 1964 New York Session Laws. From an assumption, unsubstantiated by the State and unacknowledged by appellants, that New York consumers have been paying *unjustifiably* higher prices during the reign of State-imposed mandatory resale price maintenance over the retail price of branded distilled spirits, the Legislature then proceeds to demand that New York purchasers receive not necessarily fair prices but the lowest prices. No consideration or determination is made whether the lowest price elsewhere in the United States is a fair price for New York buyers. Yet, distillers and "related person" wholesalers of branded distilled spirits may not sell in the largest market in the United States, accounting for some 12% of retail branded distilled spirit sales, unless they pay tribute exacted by the New York Legislature in the form of the lowest price granted elsewhere in any other locality in the United States, regardless of competitive or market demands or cost of operations. This statutory attempt to secure economic advantage by prohibiting sales to customers in New York unless the lowest price quoted else-

where is given in New York is an unquestioned violation of the *Seelig* line of cases.

Of course if New York can demand that branded distilled spirits be sold within the State at the lowest possible price there is nothing to prevent other states from making the same requirements before allowing branded distilled spirits to be sold. That a morass of conflicting legislation regarding the subject of lowest prices could result is readily discernible. New York, pursuant to Section 101-b-3 of the ABC Law, requires distillers and wholesalers of branded distilled spirits to file a schedule of prices by the first and the 10th of the month respectively, these prices to be effective in New York during the next succeeding month. For example, the lowest price granted in any other state in the United States in February would be filed in the March schedule of New York prices and would be the price at which the brand is sold in New York in April.

Other states could pass statutes requiring manufacturers and wholesalers of branded distilled spirits to grant the lowest price being given in any other state precisely at the time of sale within the legislating state. Or a state could adopt a statute such as has been declared unconstitutional in an unreported Kansas decision, see *Laird & Co.* v. *Gage*, Third Judicial District, D.C. No. 898461 (May 7, 1964), and demand that the lowest price given elsewhere in the United States be given in the legislating state for a definite period of time, in the case of Kansas 3 months. It can be seen that the possibilities and combinations are virtually limitless. It is also apparent that manufacturers and wholesalers of branded distilled spirits, because of conflicting requirements as to when the lowest price is to be determined, could be put in the position of being unable to comply with one act because of the mere fact they were

attempting to comply with another. Also, the danger arises that the price for distilled spirits might become frozen at a particular level; if a distiller, nationwide wholesaler or importer attempted to raise their prices in any particular state they would more than likely be risking violation of another state's no higher than lowest price statute because of the latter state's legislation being based upon conflicting time sequences.

That the Constitution of the United States does not permit such a morass of conflicting and onerous legislation to burden interstate commerce is clear. It is because of this possibility that this Court has laid down the doctrine that the Constitution does not permit a state legislature to control the conduct of those engaged in interstate commerce beyond the boundaries of the legislating state. See, *e.g.*, *Bosemon* v. *Connecticut General Life Ins. Co.*, 301 U. S. 196 (1937); *Hartford Accident & Indem. Co.* v. *Delta & Pineland Co.*, 292 U. S. 143 (1934). The New York statute has that effect. See pp. 21-23, *supra*.

This is not a case where the state has legislated in order to promote temperance, the sole rationale of the New York ABC Law, see p. 46, *infra*. Nor is it one where the state has reasonably requested the distilled spirits industry to contribute its just share of revenue to the state. Rather, this statute is solely an unreasonable, unjustified attempt by a state in which 12% of the national trade in distilled spirits is conducted to use its economic power to coerce distillers, wholesalers and importers into accommodating the state with prices which bear little relation to those that would obtain if New York market conditions were the determinant. But New York market conditions are ignored while New York prices are based upon the costs, profits, labor conditions, taste preferences and governmental regu-

lations which prevail in other states. It is submitted that it is precisely this type of legislation—grievously burdensome on commerce in other states without being of any value in protecting the public from the social problems connected with alcoholic beverage traffic—which must fall under the test established only last Term in *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U. S. 324 (1964).

POINT IV

The provisions of the new act requiring distillers and wholesalers to offer New York purchasers a price no higher than the lowest price given elsewhere are not justified under the state's police power and are hence a violation of due process of law guaranteed by the Constitution of the United States.

A. Section 9 is not in Furtherance of a Valid Police Power Objective.

The Fourteenth Amendment to the Constitution of the United States prohibits the several states from depriving any person "of life, liberty, or property, without due process of law."

It is well recognized that the constitutional prohibition against deprivation of one's property without due process of law is absolute unless property interests are affected as a result of a valid exercise of the state's inherent police power. The police power gives the state the right to impair the free enjoyment of one's property only if necessary to provide for the health, safety and general welfare of the people.

While the legislative right to pass enactments designed to advance the health, safety and welfare of the people is necessarily a broad power, it is not without limitation, for

the Fourteenth Amendment to the federal constitution stands as a guardian of individual rights when state legislation affecting these rights does not comport with police power standards. If the situation were otherwise there could be no protection of individual rights from the tyranny that would result from unbridled use of legislative power.

The distilled spirits industry in New York is basically private in nature. It is not regulated as a public utility. While admittedly subject to the sanctions of the Alcoholic Beverage Control Law, which attempt to prevent well recognized social harms that may result from undue consumption, the industry is none the less protected by basic constitutional guarantees. So long as the State allows alcoholic beverages to be sold within New York, it cannot deny members of the industry their rights under these constitutional guarantees. See *Russo* v. *Morgan,* 174 Misc. 1013, 1015, 21 N. Y. S.2d 637, 640 (Sup. Ct. 1940). See also *People* v. *Luhrs,* 195 N. Y. 377 (1908); *Wynehamer* v. *People of New York,* 13 N. Y. 378 (1856); *Clement* v. *Two Barrels of Whiskey,* 136 App. Div. 291, 120 N. Y. Supp. 1044 (4th Dep't 1910); *Schwegmann Bros.* v. *Louisiana Bd. of Alcoholic Beverage Control,* 216 La. 148, 43 So. 2d 248 (1949); cf. *Levine* v. *O'Connell,* 275 App. Div. 217, 88 N. Y. S.2d 672 (1st Dep't 1949), *aff'd,* 300 N. Y. 658 (1949).

Although this Court in recent years has refused to strike state statutes on substantive due process grounds, language in cases brought before it has indicated that the Court will apply the constitutional guarantee when as here there is no police power purpose being served. See *Goldblatt* v. *Town of Hempstead,* 369 U. S. 590, 594-95 (1962); *Williamson* v. *Lee Optical Co.,* 348 U. S. 483, 488 (1955);

Cities Service Co. v. *Peerless Co.,* 340 U. S. 179, 186 (1950); *Nebbia* v. *New York,* 291 U. S. 502, 525 (1934).

The police power rationale for the entirety of the New York ABC Law is contained in Section 2 of that law, which provides:

> It is hereby declared as a policy of the state that it is necessary to regulate and control the manufacture, sale and distribution within the state of alcoholic beverages *for the purpose of fostering and promoting temperance in their consumption* and respect for and obedience to the law. (Emphasis added.)

Section 8 of Ch. 531, as noted, states that the particular purpose for the enactment of Section 9 was to "forestall possible monopolistic and anti-competitive practices."

Nothing in the legislative history of the new act nor in the Moreland Commission reports evidences that Section 9 was enacted to thwart any other evil. Thus, in constitutional terms, this Court must be convinced that the no higher than the lowest price provisions—maximum price limitations—were in fact enacted either to promote temperance or to "forestall possible monopolistic and anti-competitive practices."

Looking first to the economic evil that allegedly will result if maximum price provisions are not enacted, affidavits contained in the record demonstrate the belief of a professional economist (Tr. 107-114) as well as members of the industry that vigorous competition has prevailed in the past and should in all likelihood continue for the foreseeable future in the distilled spirits industry at the manufacturing, wholesaling and importing levels. Indeed, the now repealed mandatory resale price maintenance section was enacted in response to the vigorous industry competition in New York, which the Legisla-

ture felt was resulting in prices too low for the public good. See ABC Law, Section 101-c-1. Appellees have offered nothing to show that competition within the industry would be any less vital if a free market prevailed in New York today. A 1963 report on industry advertising regulation published by the Joint Committee of the States to Study Alcoholic Beverage Laws, a body composed of state liquor control board members, confirms the statements of these affidavits by asserting that members of the industry "are in a highly competitive enterprise." Joint Committee of the States to Study Alcoholic Beverage Laws, *Uniform Standards for Advertising of Alcoholic Beverages in Newspapers and Magazines*, 30 (1963). This view is further supported in Alderfer and Michl, *Economics of American Industry*, 612 (3d ed. 1957).

It is axiomatic that monopolistic and anti-competitive practices cannot be pursued where competition is vigorous, for by definition it is the very purpose of these practices to restrict competition and thus among other things deprive the purchaser of the goods in question the fair price that results from free market action and to secure an artificially high price for the benefit of the producers. See *1955 Att'y Gen. Nat'l Comm. Antitrust Rep.*, 324.

Of course an obvious flaw in the stated purpose underlying Section 9 is the failure to define "unjustifiably higher" prices. The Legislature seems to attempt to transform a marketing reality—an actual differential between consumer price levels in New York and certain atypical markets—into an economic concept—price differentials are to be suppressed because they are warnings of possible attempts by distillers, wholesalers and importers to engage in monopolistic and anti-competitive practices. But in terms of antitrust economics an "unjustifiably higher" price can

result only when "a few persons acting together can control the prices of a commodity . . ." *American Tobacco Co.* v. *United States*, 328 U. S. 781, 811 (1946). This attempt to use mere retail price differentials between disparate markets as a basis upon which to predicate the potential occurrence of anti-competitive practices at the distiller and wholesaler levels emphasizes the total lack of legislative inquiry into the capacity of these segments of the industry to engage in such practices.

Competitive conditions and the cost of doing business obviously may vary widely between markets, and a producer or wholesaler of goods must be flexible enough to respond to these conditions. This is true for any product, whether it be liquor or candy, but it is especially true of liquor since the industry is subject to a wide variety of state regulation which in itself tends to affect competitive conditions in particular states. For example, lower net prices from distillers to wholesalers and from wholesalers to retailers exist in certain states because temporary promotional and advertising allowances are granted to purchasers by the sellers. In New York this practice is prohibited by Section 101-b-2(b) of the ABC Law. Because advertising allowances are forbidden in New York, distillers must bear the entire burden of this expense. An advertising allowance, an expenditure designed to stimulate sales at the expense of one's competitor, is impliedly looked upon by the New York Legislature as an anti-competitive device from which New York purchasers must be protected. In effect Section 9 of Ch. 531, requiring such allowances and discounts to be a factor in computing the lowest price given elsewhere, stipulates that distillers and New York wholesalers must indirectly give these allowances to purchasers in New York when they are forbidden by law to grant them

directly because they are not considered beneficial to the promotion of temperance. The result will be that the distiller will be forced to include advertising allowances given in other states in his New York prices, while continuing to bear the entire expense of all New York advertising. See ABC Law, Section 101-b-1.

The Legislature has set up the standard of possible monopoly, an evil theoretically existing in any industry. After establishing the evil from whole cloth, it proclaims monopoly can only be averted by demanding the lowest net prices charged elsewhere. In other words retail market price differentials are *per se* indications of an incipient monopolistic condition at the production and primary distribution levels. This view finds no support in the field of antitrust economics.

The only other reasonable basis for legislative action affecting the price at which manufacturers and wholesalers of branded distilled spirits may sell in New York is the promotion of temperance. To reiterate, in order to avoid violation of the Fourteenth Amendment to the Constitution of the United States, the New York Legislature must have detected an evil resulting from the manufacture, sale or use of alcoholic beverages which demands that maximum price limitations be placed upon the sale of these beverages by distillers and wholesalers. But, as the dissent below cogently illustrates, these maximum price provisions bear no reasonable relationship to the protection of the health, morals or welfare of the community.

The command of Section 2 of the ABC Law is a positive one; legislation regulating the manufacture, sale or use of intoxicating liquors is a proper exercise of the police power only if it *promotes* temperance. Thus, the finding of the Moreland Act Commission in support of the repeal of

mandatory resale price maintenance that price has little or no relation to temperance is not grounds for a determination that placing maximum prices upon sales of branded liquor to New York wholesalers and retailers will somehow *promote* temperance. That the legislative enactment may have no deleterious effect upon temperance is immaterial. To accord with Section 2 of the ABC Law, the statute must *affirmatively promote temperance.*

This result is in accordance with the position the distilled spirits industry occupies in the State of New York. As noted it is, first of all, a private industry, unlike public utilities, and is operated in the same general manner as other private industries. However, pursuant to Section 2 of the ABC Law, it is subject in New York to intensive regulation "Because of the many evils attendant upon traffic in liquor. . . ." *Calvary Presbyterian Church* v. *State Liquor Authority,* 245 App. Div. 176, 178, 281 N.Y. Supp. 81, 85 (4th Dep't 1935), *aff'd,* 270 N. Y. 497 (1936). Heretofore, in New York any challenge to the constitutionality of enactments affecting intoxicating liquors has been decided by the test of whether the challenged enactment met the legislative purpose of promoting temperance announced in Section 2. See *People* v. *Ryan,* 274 N. Y. 149, 152 (1937); *People* v. *Tourists International, S.A.,* 40 Misc. 2d 99, 105, 242 N. Y. S. 2d 756, 762 (Sup. Ct. 1963).

It is patent that fixing maximum price limits upon which manufacturers and wholesalers of branded distilled spirits may sell in New York in order to assure purchasers the lowest possible price for these liquors does not promote temperance. As it was put in Chief Judge Desmond's dissenting opinion below, "To promote temperance by making intoxicants cheaper is like trying to minimize the dangers of

excessive smoking by abolishing cigarette taxes" (Tr. 355-356).

Appellants, in view of the Moreland Act Commission's determination that the propensity to drink is unrelated to the price at which liquor is sold, cannot see how an argument can be made that a statute avowedly designed to accord the lowest possible price to New York liquor consumers can in fact affirmatively serve to ensure that these consumers are temperate in their use of these beverages. Can it be argued that the interests of moderation in alcoholic beverage consumption will be affirmatively advanced if consumers obtain the lowest possible prices for nationally branded spirits but not for private label brands and wines? Will alcoholism, public drunkenness and sales to minors be reduced if liquor is made more accessible through lower prices? These questions are answered by the asking.

B. Section 9 is Arbitrary and Unreasonable.

Assuming arguendo that these maximum pricing provisions function to promote the health, safety and welfare of the general populace, they still violate the Fourteenth Amendment to the Constitution. This is so because Section 9 imposes unreasonable, arbitrary and capricious burdens upon appellants which do not serve to remedy the purported evil. See *Goldblatt* v. *Town of Hempstead,* 369 U. S. 590 (1962); *Nebbia* v. *New York,* 291 U. S. 502 (1934).

Bearing in mind that this is special antitrust legislation directed to possible "monopolistic and anti-competitive practices," it becomes clear that this maximum price measure regulating the distilled spirits industry is unreasonable. This becomes apparent merely by juxtaposing Section 9 of Ch. 531, whose rationale as we have seen is the same as other antitrust acts, with the terms of these acts. None of

them, state or federal, in order to protect vigorous competition provides that sales can be made only if the sellers agree to charge maximum prices based upon the lowest price given elsewhere in the United States. Direct interference with free market pricing structures is inimical to the rationale of these acts which is a belief in free and unfettered competition.

The legislation is arbitrary, capricious and unreasonable in several other respects. The law is penal in nature, see section 101-b-3(j), and one signing the affirmations that the price filed for a particular brand in the monthly price schedule is no higher than the lowest price offered anywhere else in the United States does so at his peril.

The problems of determining the price at which a distiller's brands are sold by wholesalers to retailers are particularly grave. Section 101-b-3(f) requires the distiller to affirm that the price at which New York wholesalers who are "related persons" will sell to retailers in the next succeeding month is no higher than the lowest price at which wholesalers doing a substantial business in the distiller's brands in other states sold those brands during the immediately preceding month.

Most of the wholesalers to whose prices the distillers must attest are independent businessmen and are under no legal obligation to give information as to their prices or the quantity of the business they do in a particular distillers' brands to the distillers. Thus, for example, a distiller may sell his brand to an independent Chicago wholesaler, who does a substantial volume of business in the distiller's brands. The Chicago wholesaler, permitted by law, may charge a net price to retailers that includes various discounts and promotional allowances. These discounts and

allowances are not published in any trade journal. But before a New York wholesaler who is deemed to be a "related person" can sell that brand to New York retailers, the distiller must have verified an affirmation that the price schedule filed by the New York wholesaler lists a price to New York retailers that is no higher than the lowest price at which the Chicago wholesaler sold that brand during the preceding month.

The record shows that independent wholesalers in other states, under no legal compulsion to do so, may not furnish such information to the distillers (Tr. 118, 122, 123). Section 101-b-3(f) will prevent a large group of New York wholesalers from selling branded distilled spirits to retailers in New York; it will require distillers to threaten to refuse to sell to wholesalers elsewhere in the United States unless such information is delivered, a type of coercion that would appear to be objectionable under federal antitrust laws. See *F. T. C.* v. *Beech-Nut Packing Co.*, 257 U. S. 441 (1922); *George W. Warner & Co.* v. *Black & Decker Mfg. Co.*, 277 F.2d 787 (2d Cir. 1960); *A. C. Becken Co.* v. *Gemex Corp.*, 272 F.2d 1 (7th Cir. 1959).

The majority opinion below fails to evince concern over this situation. Nor does it even acknowledge that distillers and New York "related person" wholesalers—both in their own way dependent upon obtaining pricing information from wholesalers throughout the country—have no legal means by which they can obtain the information needed to satisfy the command of Section 9.

Section 9 is also unreasonable because it exposes distillers to extortionate practices at the hands of "related person" wholesalers in other states. Once again, taking the example of the Chicago wholesaler who does a "sub-

stantial'' part of his business in the brands of one distiller, assume that out of vindictiveness or in an attempt to extort various concessions from the distiller, this Illinois wholesaler threatens to or does sell one case of each of the distiller's brands several dollars below the ordinary case price. The predicament in which this maneuver would place the distiller is obvious. He could not sell the brand in New York for the month in question unless New York ''related person'' wholesalers file a price schedule containing the extortionate price charged by the Chicago wholesaler. Of course, the New York distiller to wholesaler price would have to be adjusted accordingly. The loss to the distiller in actual profits and in the good will of New York wholesalers would be enormous. All this because of the sale of one case by a reprehensible wholesaler.

Taken one step further, the one case sale at the unjustified lower price would place New York wholesalers in an intolerable position. If ''related person'' wholesalers chose the course of filing the Chicago wholesaler's case price for the brand rather than not selling it at all, non-related person New York wholesalers, otherwise free to sell at a price of their own choosing, would either be forced to meet this price or face the loss of sales to those selling at the lower price. Retailers would stockpile large orders at the lower per case price which would cause wholesalers and distillers irreparable loss even if the normal price were soon restored.

If ''related person'' wholesalers chose not to sell the brand at all during the period rather than sell at the cut price per case, non-related person wholesalers, free to sell at a price of their own choosing, could thus charge an ''unjustifiably higher'' price because of the freedom from competition with the ''related person'' wholesalers. In any event, they would have the entire New York market to themselves

for at least a month. The "related person" wholesalers, aside from being penalized the loss in sales, might permanently lose customers to the non-related person wholesalers. The statute thus gives any "related person" wholesaler anywhere in the country the power to blackmail appellant-distillers. This condition could also permit collusion between a distiller and an out of state wholesaler, with the result that the wholesaler could sell the brands of the distiller's competitor at prices so low as to prevent the competitor from being able to market his brands in New York. The collusive distiller would then enjoy a marked competitive advantage in New York for the period his competitor was faced with the dilemma of selling at a severe loss in New York or not selling at all and risking the loss of his New York market. That such a fantastic spectacle is without the bounds of reason can hardly be questioned.

There is another glaring defect in the requirement of Section 9 of Ch. 531 that "related person" wholesalers located in New York sell to New York retailers at a price no higher than the lowest sold by "related person" wholesalers elsewhere in the United States. The section makes no allowance for variances in wholesaler cost and profit margins, two figures that fluctuate widely throughout the United States because of such factors as differences in wages, local sales and gross receipts taxes, overhead and number of retail licensees serviced. Thus, New York wholesalers, who enjoy one of the lowest profit margins and endure one of the highest percentages of operating costs, see p. 17, *supra*, must offer New York retailers a price which may have been offered to retailers in other states by a wholesaler who enjoyed a much higher operating profit and a much lower percentage of net operating expense.

The gross inequity of this provision is patent, for New York wholesalers are at the mercy of those operating in other states who, of course, care nothing for the plight of New York wholesalers but are only concerned with competitive conditions in their own market. The obvious effect of such a provision will be that those New York wholesalers unable to exist by the standards prevailing in another market will be driven out of business. The bitter irony of this situation is apparent—a statute ostensibly devised to limit monopolistic practices and encourage free price competition will inevitably have the effect of reducing the number of wholesalers and establish a much more fertile field for monopoly operations. Such obvious unreasonableness cannot be sanctioned by this Court.

In summary this Court must conclude that with present antitrust laws readily available to achieve the professed legislative goal without penalizing the innocent as well as those who may be guilty of anti-competitive practices in the future, Section 9 of Ch. 531 is patently arbitrary and unreasonable because it does not lead to a reasonable expectation of achieving the state's objective and it forces "related person" New York wholesalers to price their merchandise in accordance with conditions prevailing in other markets. This result surely presents a federal question of substance.

C. Section 9 is Intolerably Vague.

It is well established that a legislative enactment requiring prospective action and imposing criminal penalties for failure to act correctly is violative of due process of law unless its terms are sufficiently clear for a man of reasonable intelligence to comply with them.

It cannot be overemphasized that a statute which makes criminal conduct otherwise lawful must, by its nature, "be

more definite than civil statutes." Note, *Due Process Requirements in Statutes,* 62 Harv. L. Rev. 77, 85 (1948); see *Winters* v. *New York,* 333 U. S. 507, 515 (1948).

As heretofore pointed out, what is now Section 101-b-3(f) of the ABC Law requires brand owners of liquor to file a verified affirmation that the price of wholesalers selling the brand owner's brands to New York retailers is no higher than the lowest price charged by "such brand owner . . . or any related person" to any retailer elsewhere in the United States. The definition of a "related person" includes any person

> . . . (2) the exclusive, principal or substantial business of which is the sale of a brand or brands of liquor purchased from such brand owner or wholesaler designated as agent . . . ABC Law, Section 101-b-3(d)(f).

The act and the regulations recently promulgated pursuant thereto by the State Liquor Authority have segregated those who sell liquor to New York retailers into the following categories.

If one is a brand owner or a person "related" to the brand owner, the price charged to New York retailers can be no higher than the lowest charged elsewhere in the United States by the brand owner or a non-New York "related person." The brand owner is charged with affirming and verifying this price to be no higher than the lowest charged elsewhere. See ABC Law, Section 101-b-3(f); Rule 16 of the State Liquor Authority, as amended.

If, however, a New York wholesaler is willing to affirm he is not "related" to the brand owner, he may then avail himself of the less rigorous requirements of Section 101-b-3(g). As interpreted by amended Rule 16 of the recent regulations, paragraph (g) requires a non-related person wholesaler selling to New York retailers to affirm only that

his prices to retailers in other states are no lower than those he has filed in his New York price schedule.

Patently, if one sells to New York retailers only he can charge any price he pleases, unlike his "related person" competitor, who has his maximum price determined as the lowest price charged by any other "related person" wholesaler elsewhere in the United States. If one does sell to retailers in another state and is not a "related person", he must file a New York price no higher than the lowest price *he* charges in any other state.

The obvious question is how does one ascertain exactly who is a "related person." The question is hardly academic to one charged at the risk of criminal penalty and the loss of license with affirming that a "related person" elsewhere in the United States did not sell either to wholesalers or retailers, as the case may be, at a price lower than that contained in the price schedules of New York "related person" wholesalers for a particular month. Further, how can wholesalers know if they are related persons, interdicted from selling to their customers until the brand owner files his affirmation, or if they retain the traditional free enterprise right to sell at a price of their own choosing.

Appellants submit that there is no way of determining who these wholesalers are and that manufacturers charged with affirming that these wholesalers' prices are the lowest given elsewhere have no standard by which to avoid the criminal penalties of the act.

There are some 900 licensed wholesalers operating throughout the United States. Of these some may do as much as 80 per cent of their business in the brands of a particular brand owner. From this high point, the percentage decreases to a very small level. These percentages are also representative in New York. At what stage in this

spectrum is a brand owner safe in assuming that a particular wholesaler is a related person or a wholesaler in assuming he is not? Is it 40 per cent, 50 per cent, 20 per cent? And if a wholesaler only does 3 per cent of his business in the brands of a particular brand owner but that 3 per cent represents his profit margin, can one safely say that the wholesaler does not do a substantial part of his business in the brands of the brand owner concerned? It is assumed that "exclusive" means 100 per cent, but when it comes to determining what "principal or substantial" means one required to file an affidavit at the peril of up to six months in prison is not furnished with the constitutional guidelines required by the authority cited above.

An example of how small a percentage the word "substantial" may encompass in an antitrust context is given in the case of *Brown Shoe Company* v. *United States,* 370 U. S. 294, 327 (1962), an antitrust case in which it was found that a shoe manufacturer with less than 5 per cent of the market nevertheless had a sufficient share of that market to allow it "to substantially lessen" competition. See also *Standard Oil Co. of California* v. *United States,* 337 U. S. 293 (1949) (6.7% of the area market in question); *International Salt Co.* v. *United States,* 332 U. S. 392 (1947) ($500,000 volume considered substantial *per se*).

Since it is to a New York wholesaler's advantage not to be designated a "related person", there is every likelihood that brand owners, attempting to avoid criminal penalties by affirming the price schedules of many wholesalers, will come into conflict with wholesalers who deny they are related. Such disharmony could well militate against the achievement of an orderly pattern of liquor distribution which it is the purpose of the ABC Law to encourage in seeking to

achieve its overall goal of promoting temperance. See ABC Law, Section 101-b-1. But as the law now stands a wholesaler has no recourse to state authorities if a distiller should decide the wholesaler conducts a "substantial" part of his business in the brands of the distiller. The wholesaler's right to price freely can thus be abrogated by an act over which he has no control.

In sum, one is forced to grope in the dark and make arbitrary decisions as to which of his many purchasers is a statutory "related person." Should he guess wrong he may go to prison, his firm may lose its license and the wholesalers of New York, who have no hand in determining who is a related person, may nevertheless be prevented from selling the merchandise involved to New York retailers. It is difficult to imagine a more clear cut example of unconstitutional burdens arising from the vagueness of a statute.

POINT V

The no higher than the lowest price provisions of Section 9 of Chapter 531, 1964 New York Session Laws, deny appellants equal protection of the laws guaranteed by the Constitution of the United States.

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."

The essence of this constitutional requirement is that all those similarly situated must be treated alike. That is, legislation cannot constitutionally discriminate in its application between those in a group having definite attributes of identity. *Reynolds* v. *Sims,* 377 U. S. 533 (1964); *McGowan* v. *State of Maryland,* 366 U. S. 420 (1961).

With these guidelines in mind, it becomes necessary to examine Section 9 of Ch. 531 to ascertain if discrimination against members of the same general class has been effected. Wholesalers in New York who somehow are determined not to be "related persons" are unaffected by Section 9. See ABC Law, Section 101-b-3(g); State Liquor Authority, Rule 16, as amended. Insofar as the statute is concerned they can sell the same brands sold by "related person" wholesalers at any price they choose. Yet it has been seen that "related person" wholesalers will not be able to sell branded liquor until receiving an affirmation from the brand owner that the price schedule filed by the wholesaler lists a price no higher than the lowest at which the brand owner or wholesalers in other states who come within the definition of related persons sold the product in the immediately preceding month.

If the brand owner for any reason fails to file such an affirmation, the New York related person wholesaler is prevented from selling the brand for at least a month. ABC Law, Section 101-b-3(h). On the other hand the unrelated New York wholesaler will be able to sell that very brand at a price of his own choosing. These New York wholesalers will certainly enjoy a marked competitive advantage. As the cases clearly indicate, such discrimination between those having no marked distinguishing characteristics is prohibited by the equal protection clause.

In upholding the statute, the majority of the court below failed to discuss this example of prohibited legislative discrimination.

The treatment given to private brands by the legislation in question is another example of unconstitutional discrimination. Distilled spirits marketed as "private brands"

owned by a New York retailer are not subject to the provisions of Section 9 of Ch. 531. Yet private brands in 1963 accounted for 12 per cent of New York's retail package store sales in stores handling private labels. These labels are sold in direct competition with nationally branded items. They often enjoy a competitive advantage as the brand-owner retailer, making a larger profit on his private brands, will often attempt to convince a consumer to select the private label in preference to a nationally marketed brand. No legislative determination to the effect that owners of private labels are less likely to charge unreasonably high prices as opposed to sellers of nationally branded distilled spirits exists. And yet brand owners of nationally branded liquors are forced to undergo added expense and face possible criminal penalties, in addition to risking the loss of their license, while those owning private label brands are exempt. It is this type of discrimination which is clearly prohibited by the equal protection clause of both the State and federal Constitutions.

In summary it is believed that there is no legitimate basis for discriminating against manufacturers and related person wholesalers of branded distilled spirits whose products are sold in the same retail outlets and in competition with private label brand liquors. It cannot be doubted that compliance with Section 9 of Ch. 531 will be a costly and burdensome process at best. To make manufacturers and "related person" wholesalers of branded distilled spirits risk their right to do business in New York and not impose the same conditions upon other wholesalers, or upon private label owners is clearly an improper discrimination. It is the purpose of the equal protection clause to prevent just such discrimination.

POINT VI

Certain provisions of Section 7 of Chapter 531, 1964 New York Session Laws, also violate the federal constitution.

Section 7 of Ch. 531 would require brand owners to file schedules of their prices to wholesalers "irrespective of the place of sale or delivery." This new requirement can only mean that sales by brand owners to all wholesalers in every state must be filed with the State Liquor Authority.

The rationale for this provision is obvious; it will provide the Authority with an aid in policing the lowest price affirmations of Section 9 of Ch. 531. Regardless of purpose, the commerce clause of the federal constitution does not permit New York to require brand owners to file this information regarding their operations in other states. See *Florida Lime & Avocado Growers, Inc.* v. *Paul,* 373 U. S. 132, 154 (1963).

Section 7 also requires the basic price schedules to contain "the net bottle and case price paid by the seller." By its terms Section 7 applies to all brand owners of liquor, vintners of wine and wholesalers of both, but amended Rule 16 of the State Liquor Authority has confined its impact only to importers and wholesalers of distilled spirits by exempting vintners and distillers from the requirements of the express statutory terms.

It is submitted that not only does this discriminatory rule exceed the authority of the State Liquor Authority in that it is an attempt to amend legislation rather than supplement it, see *Kasper* v. *O'Connell,* 38 Misc. 2d 3, 237 N. Y. S.2d 722 (Sup. Ct. 1963); *Kaplan* v. *McGoldrick,* 198 Misc. 440, 100 N. Y. S.2d 45 (Sup. Ct. 1950); *New York City Housing Auth.* v. *Knowles,* 200 Misc. 156, 103 N. Y. S.

2d 270 (Munic. Ct. 1951), but that there is no valid reason for requiring this information. The Legislature is concerned in Ch. 531 with the lowest price charged by manufacturers, importers and wholesalers to their customers, not with the cost of the goods to these sellers. Further, the difference beween the price paid by the seller and the price he charges his customer can be misleading, for there is no provision to reflect the seller's expenses which, as pointed out, leaves New York wholesalers with one of the lowest margins of profit among distilled spirits wholesalers in the United States. This requirement will erroneously convince one's customers that the seller is enjoying an inordinate profit and will lead to an unjustifiable call for still lower prices. Certainly no more capricious and constitutionally unreasonable act can be imagined than one having no relation even to the avowed legislative purpose.

CONCLUSION

This case raises questions of far-reaching social and economic importance, which can be answered only by resolving several acute issues of federal constitutional law, including:

1. Is a state statute which fails to promote temperance, but which fixes maximum prices for distilled spirits in one state at a price no higher than the lowest price charged in any other state and thereby levies a major economic burden on the consumers of distilled spirits in other states, validated by the 21st Amendment to the Constitution of the United States?

2. Is not a state statute requiring distillers and wholesalers of alcoholic beverages to sell at a price no higher than the lowest price charged in any other state in conflict

with the terms and policy of the Robinson-Patman and Sherman Antitrust Acts, and thus violative of the supremacy clause of the Constitution of the United States?

The final judgment of the Court of Appeals of the State of New York requires this Court's review.

Respectfully submitted,

HERBERT BROWNELL
THOMAS F. DALY
25 Broadway
New York, N. Y. 10004
Attorneys for Appellants

THOMAS F. DALY
GERARD A. NAVAGH
GENE R. MCHAM
LORD, DAY & LORD
Of Counsel

Dated: September 3, 1965